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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re

BRUCE TREADWAY,

on

Habeas Corpus.

B210794

(Los Angeles County
Super. Ct. No. BH005325)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. David S. Wesley, Judge.
Relief granted.

Nancy L. Tetreault by appointment of the Court of Appeal under the California
Appellate Project's Independent Case System for Petitioner.

Edmund G. Brown, Jr., Attorney General of the State of California, Dane R.
Gillette Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney
General and Charles Chung, Deputy Attorneys General for Respondent.

INTRODUCTION

This habeas corpus proceeding arises from the seventh denial of a parole date for petitioner Bruce Treadway (Mr. Treadway) by the Board of Parole Hearings (Board). On November 20, 2008, we issued an order to show cause to review the Board's action and appointed counsel for Mr. Treadway. We received a return to the petition from the Attorney General and a reply from Mr. Treadway. After finding that the Board lacked "some evidence" that Mr. Treadway's release on parole would constitute an "unreasonable risk" of danger to the community under either state or federal constitutional standards, we issue a writ vacating the Board's denial and order it to find Mr. Treadway suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of Mr. Treadway's conduct in prison subsequent to his 2008 parole hearing supports a determination he currently poses an unreasonable risk of danger to society if released on parole.

FACTS AND PROCEDURAL STATUS

I. The Commitment Offense

In 1982, Mr. Treadway was at home at approximately midnight taking a bath when he heard what he believed to be two persons attempting to steal his motorcycle which was parked outside just off an alley by his house. He immediately jumped from the bathtub, put on his underwear and shorts and went to check on the safety of his wife and children. After determining that his family was not in danger at that moment, he went into his office and obtained his .22 rifle. He ran barefoot to the alley to head off the thieves. Once he entered the alley, he saw two would-be burglars (who were illuminated slightly by a street light) pushing his motorcycle out of the alley and around a corner. He ordered the would-be robbers to stop in an attempt to prevent them from stealing his property or hurting his family. However, the thieves did not heed his warning and continued to push his motorcycle away from his house. Once the robbers made their way out of the alley, it was very dark and Mr. Treadway could not see either of them.

However, he continued to pursue them in the hopes of retrieving his property. He again yelled "stop" at the robbers and attempted to fire a warning shot into the air in order to frighten the perpetrators. Mr. Treadway's rifle misfired and he was forced to re-cock his weapon. Once they were out of the alley, the robbers dropped Mr. Treadway's motorcycle and ran through a stand of trees near the road by Mr. Treadway's house. It was very dark and Mr. Treadway fired two shots into the complete darkness in the direction of the stand of trees. Each of these shots hit one of the robbers, one of whom later died of his wounds.

II. Procedural History

After he was arrested, Mr. Treadway was released on \$10,000 bail while awaiting trial. More importantly, Mr. Treadway was offered a negotiated plea bargain by the prosecution which consisted of a guilty plea to the charge of manslaughter in exchange for the two weeks he had served in jail. Mr. Treadway refused the offer.

At trial, on April 22, 1983, a jury convicted Mr. Treadway of second degree murder. On June 3, 1983, he was sentenced to 15 years to life in prison. Despite the fact that both the trial judge and the probation officer who prepared the report for Mr. Treadway's case recommended that he serve a minimum sentence, Mr. Treadway has been incarcerated since 1983 and is now 65 years old. As stated above, he has been denied parole seven times.

Mr. Treadway's latest hearing before the Board was held on March 5, 2008, at which time he was again denied a parole date, this time for one year. The Board contended that it based its decision on several factors which led it to conclude that there was "some evidence" that if Mr. Treadway were to be released from custody, he would constitute an "unreasonable risk of harm" to society or a threat to public safety. Among these factors were: the commitment offense; Mr. Treadway's "contact with law enforcement"; as well as the Board's opinion that Mr. Treadway had not "programmed" well while institutionalized. However, the members of the Board admitted that they

"were all over the place" in attempting to determine whether to grant Mr. Treadway a parole date.

In addition, the Board based its decision on the fact that Mr. Treadway had received six 128(a) counseling chronos and eight 115 disciplinaries while imprisoned despite the fact that the last of these reprimands occurred in 1997, 11 years before Mr. Treadway's last hearing before the Board.

Finally, the Board was concerned because Mr. Treadway did not present it with any type of parole plans and expressed some unease about returning to the outside world after being incarcerated for so many years. However, prior to the time that Mr. Treadway was incarcerated he was a licensed pilot, an engineer, a photographer and had owned a print shop. He was married and a father. Therefore, there is no evidence that Mr. Treadway could not support himself or acclimate himself to the mores of current society or find suitable employment upon his release.

Moreover, while he had been convicted of several felony offenses prior to the commitment offense, in each of these cases he was placed on probation. Further, he committed no further crimes for the next 16 years until 1982. Therefore, it is clear that Mr. Treadway led a life free of any type of criminal activity for many years prior to the offense for which he was imprisoned. Mr. Treadway is now 65 and has spent most of his adult life in prison for defending his family and property.

In Mr. Treadway's favor, the Board noted that the psychological report which was prepared by Richard Starrett, Ph.D., on December 11, 2007, rated Mr. Treadway's future risk of general recidivism in the low range. More importantly, Dr. Starrett found that Mr. Treadway's "[propensity] for violence in the free community [was] most likely even less than that indicated by the [psychological] risk assessment instrument, which [was] in the low range. [Mr. Treadway's] declining health, his age, lack of any prior instances of violence in the community before the controlling case, all indicated [Mr. Treadway's] violence potential [was] probably closer to very low." Nevertheless, despite Dr. Starrett's positive report, the Board refused to set a parole date for Mr. Treadway on the ground

that there was "some evidence" that he would pose an unreasonable risk of danger to society.

Moreover, while as stated above, the members of the Board acknowledged that "[they] were all over the place" in attempting to decide whether to grant Mr. Treadway parole, they finally decided to "light a fire under [him]" by denying him parole for one year. However, the Board did not specify why it wanted to "light a fire" under Mr. Treadway or just how he should behave in prison in order to be granted parole once this fire was lit. More importantly, the Board did not explain how "lighting a fire" under Mr. Treadway constituted, or ever could constitute, a reason to deny him parole let alone form the basis for its decision that there was "some evidence" that he posed an unreasonable risk of danger to society if released.

On June 13 and July 14, 2008, Mr. Treadway submitted a petition for writ of habeas corpus to the superior court which was acted upon by the court on July 30, 2008. The superior court denied Mr. Treadway's petition on basically the same grounds as those set forth by the Board and concluded "that the record contain[ed] 'some evidence' to support the Board's finding that the petitioner present[ed] an unreasonable risk of danger to society and [was] unsuitable for parole." The superior court based its decision on California Code of Regulations, title 15, section 2281 and *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667. This petition followed.

STANDARD OF REVIEW

In August of 2008, our Supreme Court set forth the standard of review for courts to apply when determining whether the Board acted outside its authority in refusing to grant parole to an inmate in *In re Lawrence* (2008) 44 Cal.4th 1181. Specifically, the Supreme Court stated "that because the core statutory determination entrusted to the Board . . . is whether the inmate poses a *current* threat to public safety, the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she *currently* is dangerous." (*In re*

Lawrence, supra, 44 Cal.4th at p. 1191, italics added.) Accordingly, we review the Board's decision to determine whether Mr. Treadway poses a danger to society *today*.

Moreover, although the Board has been granted broad authority in rendering its decisions concerning an applicant's suitability for parole and judicial review is limited, "a petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation.'" [Citation.] (*In re Lawrence, supra*, at p. 1205.) Therefore, we apply these principles when determining that Mr. Treadway was unreasonably denied a parole date by the Board. Utilizing the *Lawrence* standard, the Board's decision to deny parole to Mr. Treadway is not based on any evidence which rationally supports the Board's view that Mr. Treadway poses an unreasonable risk of danger *at the present time* if he were released from prison.

DISCUSSION

Title 15, section 2281 of the California Code of Regulations sets forth the factors to be considered by the Board when determining whether an inmate is a proper candidate for parole. This regulation mandates that the Board assess whether an inmate poses an unreasonable risk of danger to society if he or she is released from prison. In rendering its decision, the Board is required to take into account the nature of the crime, the inmate's social background, his or her rehabilitative efforts, demonstration of remorse, past criminal history and any mitigating circumstances of the crime. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) The Board must set a release date at a parole suitability hearing unless it determines that "consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b).) Generally, "parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." [Citation.] (*In re Lawrence, supra*, at p. 1204.)

The Attorney General argues that Mr. Treadway is not a proper candidate for parole because the Board found, among other reasons, that Mr. Treadway had failed to program or participate in self-help while incarcerated. The return also pointed to the Board's concern with Mr. Treadway's ability to adjust to release and deal with the current stresses of society because Mr. Treadway had offered his own concerns to adjusting to the "outside world" after his long incarceration.¹ However, Mr. Treadway based his concerns on the fact that he did not believe (after so many parole hearings and so many denials) that he would ever be released. Moreover, Mr. Treadway stated forcefully that he did want to be paroled.

Mr. Treadway's reply contends that the record failed to support the Board's finding that Mr. Treadway *currently* poses an unreasonable risk of danger to society. Mr. Treadway is correct.

Specifically, although Mr. Treadway was convicted of several felonies prior to the commitment offense, none of these convictions resulted in Mr. Treadway's incarceration. Rather, he was granted probation for each offense.² In fact, Mr. Treadway's only act of violence occurred during his attempt to protect his family and prevent the theft of his motorcycle. Moreover, this incident occurred in 1982, 16 years after Mr. Treadway's initial encounters with law enforcement. Therefore, it is clear that Mr. Treadway led a life free of criminal behavior for many years prior to the offense for which he was incarcerated in 1983. This fact, in and of itself, is evidence of rehabilitation.

¹ Although in the Attorney General's return, he stated that Mr. Treadway was appealing from the Governor's 2007 decision finding him unsuitable for parole, Mr. Treadway is in fact appealing from the Board's 2008 decision which found him to be unsuitable for parole.

² It is also worth noting that Mr. Treadway was offered a negotiated plea for the commitment offense and, had he accepted it, would have been required to serve merely two weeks in jail.

Mr. Treadway has expressed remorse for the actions he took on that night in 1982.

With regard to the Board's and the Attorney General's contentions that Mr. Treadway is not a good candidate for parole because he has expressed apprehension at learning the ways of the modern world, in fact he has a record of exceptional work while incarcerated; has completed three years of college during his time in prison; is a licensed pilot, an engineer, a technical writer and once owned a print shop. Hence, Mr. Treadway does not lack either the intelligence or skills to lead a productive life while on parole and after.

It is true that Mr. Treadway has not attended AA or NA meetings while in prison. However, he does not drink and has never used drugs. Therefore, unlike other prisoners, Mr. Treadway did not need to attend AA or NA meetings in order to "program" satisfactorily.

With regard to Mr. Treadway's fear of the world as it now exists, the Board itself advised Mr. Treadway that there were residential transitional housing facilities where he could reside and be taught to live a productive life outside of prison.

Finally, Mr. Treadway's psychological reports are more than favorable. He has been determined to be in the low risk category to society *at the present time*. Thus, the Board has not demonstrated that he constitutes an unreasonable risk of danger to society if released or that there is "some evidence" that he may in fact pose such a risk. Rather, the Board appears to have based its decision on "lighting a fire under" Mr. Treadway to "do something" which the Board did not specify other than for Mr. Treadway to participate in more self-help classes or to read articles on what he will need to "succeed on the outside." However, the Board did not demonstrate in any fashion that Mr. Treadway would be a danger to society *at the present time* if he were afforded a parole date or that there was "some evidence" that such a risk of violence was imminent if he were released. Therefore, the evidence relied upon by the Board in this case does not provide "some evidence" that Mr. Treadway remains a *current* threat to public safety. "Accordingly, [the Board's] decision is not supported by 'some evidence' of current

dangerousness." (*In re Lawrence, supra*, at p. 1227.) Specifically, as set forth above, the record before the Board at the March 5, 2008, parole suitability hearing is devoid of any evidence to support the conclusion that Mr. Treadway's release would constitute a current threat to public safety.

The Supreme Court in *Rosenkrantz, supra*, 29 Cal.4th at page 658 stated, "If the [Board's] decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." However, as discussed in *Lawrence*, the Supreme Court instructed the reviewing court not to examine simply whether some evidence supports the existence of certain factors related to unsuitability for parole, but rather, considering the entire record presented at the parole hearing, "whether some evidence supports the *decision* of the Board . . . that the inmate constitutes a current threat to public safety." (*In re Lawrence, supra*, at p. 1212.) Because we have concluded that no such evidence exists in "the full record before the Board" (*id.* at p. 1221), vacating the denial of parole and directing the Board to conduct a new hearing on the same record would be a meaningless exercise in this case. (*In re Gray* (2007) 151 Cal.App.4th 379, 411.) Thus, there is no reason to order the Board to conduct any further hearing in this matter in the absence of some new evidence about Mr. Treadway's post hearing conduct. (*In re Singler* (2008) 169 Cal.App.4th 1227, 1245 [directing the Board to hold a new hearing and to find Mr. Singler suitable for parole "unless *new evidence* of his conduct and/or change in mental state *subsequent to the 2006 parole hearing* is introduced and is sufficient to support a finding that he currently poses an unreasonable risk of danger to society if released on parole".] Accordingly, rather than order Mr. Treadway released forthwith, we direct the Board to find Mr. Treadway suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that *new and different evidence than that presented at the hearing in 2008 of Mr. Treadway's conduct in prison* supports a

determination that he currently poses an unreasonable risk of danger to society if released on parole.

DISPOSITION

The petition for writ of habeas corpus is granted. The Board is directed to find Mr. Treadway suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new and different evidence of Mr. Treadway's conduct in prison subsequent to his 2008 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole. In the interests of justice and to prevent frustration of the relief granted, this decision shall be final as to this court five days after it is filed. (Cal. Rules of Court, rule 8.264(b)(3); *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1492.)

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.